83-1424

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO.

JACK BROCK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

I. DID THE ELEVENTH CIRCUIT COURT OF APPEALS MISAPPLY THE LAW OF THE CASE DOCTRINE IN REFUSING TO REEXAMINE THE ISSUE OF EXIGENT CIRCUMSTANCES WHERE THE PANEL HAD RULED ON THAT ISSUE ON APPEAL FROM THE FIRST TRIAL AND ADHERED TO THE ORIGINAL RULING ON APPEAL IN THE SECOND TRIAL DESPITE THE PRESENTATION OF SUBSTANTIALLY DIFFERENT FACTS?

II. IS THE PANEL'S FINDING THAT EXIGENT CIRCUMSTANCES EXISTED TO JUSTIFY THE GOVERNMENT'S WARRANTLESS SEARCH OF THE DEFENDANT'S DWELLING IN DIRECT CONTRAVENTION TO SETTLED CASE LAW OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL?

III. ASSUMING ARGUENDO THAT AN EXIGENT CIRCUMSTANCE EXISTED AT THE TIME OF THE DEFENDANT'S ARREST, DOES THE FACT THAT THE GOVERNMENT CREATED THAT EXIGENCY PRECLUDE THE GOVERNMENT FROM RELYING UPON IT TO JUSTIFY THE SEARCH?

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STATEMENT OF PRIOR PROCEEDINGS AND DISPOSITION

This Petition for Writ of Certiorari arises out of a final judgment of guilt rendered in the United States District Court for the Southern District of Florida on December 15, 1982, and entered on January 18, 1983, before the Honorable James W. Kehoe. (S.T.T. 259). A notice of appeal was filed by the Defendant on January 18, 1983. On appeal, the Eleventh Circuit panel affirmed. In a per curium opinion (Hatchett, Anderson & Clark, Circuit Judges) the panel held that the law of the case doctrine bound both the District Court and the Circuit Court of Appeals to the prior findings of facts and conclusions of law which were rendered by the Eleventh Circuit in the first appeal of the same case.

The Defendant Jack Brock was first tried on February 26, 1980, based on an indictment filed in the Southern District of Florida alleging conspiracy to distribute cocaine, possession with intent to distribute cocaine, and use of a communications facility in the commission of a felony. (F.R.1).

Brock filed a Motion to Suppress which the District Court granted in part and denied in part. A mistrial was subsequently granted on another basis. The government appealed the granting of the Motion to Suppress. (F.R.127).

In that first appeal the granting of the Motion to Suppress was reversed.

The panel held, inter alia, (1) that the rule of Payton v. New York, 445 U.S. 573 (1980), holding unconstitutional

warrantless entries into private dwellings absent exigent circumstances, was not the law in the Fifth Circuit prior to Payton, (2) that Payton was not retroactive,[1] and (3) that even if exigent circumstances were needed to justify the search, such circumstances were present in the case notwithstanding the trial judge's determination to the contrary. United States v. Marszalkowski, 669 F.2d 655 (11th Cir. 1982).

Brock then went to trial a second time on December 15, 1982. (S.T.T.1). Brock filed a renewed Motion to Suppress which the trial judge denied. (S.T.T. 71). Brock was convicted on December 15, 1982. He appealed that conviction to the Eleventh Circuit Court of Appeals, which affirmed

on the grounds that the law of the case doctrine bound the court to its original determination that exigent circumstances existed to validate the warrantless search.

The parties will be designated as follows:

The Petitioner will be referred to as "Jack Brock," "Mr. Brock," or "the Petitioner."

The government will be referred to as "Respondent" or "government."

The first trial which commenced February 26, 1980 will be referred to as "the first trial," or "the initial trial."

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[1]Prior to the Defendant's second trial, the United States Supreme Court ruled that Payton was retroactive as to all cases pending at the time Payton was decided. United States v. Johnson, ___ U.S. ___ (1982), 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982).

The second trial of December 15, 1982 will be referred to as "the second trial," or "the retrial."

References to the first trial transcript (beginning February 26, 1980) will be made use of the symbol (F.T.T.).

References to the records from the first trial will be made by use of the symbol (F.R.).

References to the motion to suppress hearing during the first trial will be made by use of the symbol (F.M.S.).

References to the transcript from the second trial of December 15, 1982 will be made by the use of the symbol (S.T.T.).

STATEMENT ON JURISDICTION

The judgment of the Court of Appeal for the Eleventh Circuit was entered on November 15, 1983. This Petition for Certiorari was filed within 90 days of that time. This Court's jurisdiction is invoked under 28 U.S. ¶1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., 4th Amend.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by

oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE AND FACTS

On November 7, 1979, DEA Agents, Charlie Brown, Jr. and Lester Thompson, acting in an undercover capacity, went to Lorain Bennett's place of business accompanied by an informant. (F.T.T. 50). Agent Brown told Bennett that he wanted to buy large quantities of cocaine. Bennett replied that he had a supply of cocaine (F.T.T. 52). Agent Thompson asked Bennett if Bennett could supply him with four to five kilograms of cocaine per month and Bennett replied that he could. (F.T.T. 52).

On November 8, 1979 Agent Brown met Bennett at a Ramada Inn where the transaction was consummated. (T.T. 61-62). Bennett was arrested at about 9:30 P.M. and taken to the DEA Office. (F.T.T.61, 65-66).

At Agent Brown's request, Bennett agreed to make a "controlled" telephone call that evening to his alleged source, later identified as Jack Brock. (F.T.T. 81). Prior to the phone call, the DEA dispatched two units to "sit on" the apartment which Bennett had identified as belonging to Brock. (F.M.S. 163, F.T.T. 81). Unbeknownst to Brock, the government tape recorded the telephone call. (F.T.T. 81). During the telephone conversation, the voice identified as Brock stated that he could have "three more tomorrow." (F.M.S. 31). Mr. Brock did not indicate that he had cocaine at the apartment or that anyone else involved in the transaction was present in the apartment that evening. (F.M.S. 32).

Additionally, as Agent Brown admitted at the second trial, contrary to the testimony at the first trial, Brock did not expect Bennett to call him again later that evening or to appear at his home. (S.T.T. 59). Government agents did not permit Bennett, who was in government custody, to telephone Brock again to insure that Brock would not expect him that evening. Agent Brown also admitted at the second trial that Brock did not know agents were coming to his home.

After the telephone conversation, Bennett directed agents Brown, Thompson and Perry to Brock's apartment. (F.T.T. 85) The agent had previously sought and received authority from the Assistant United States Attorney to arrest Brock. (F.M.S. 34).

The agent went to the apartment for the purpose of arresting Brock and not to effectuate a search. (F.M.S. 36, 311). Agent Brown testified that he did not know the identity of the lessee of this apartment. (F.M.S. 37). Agent Perry stated that he did not know anything about Brock and specifically did not know if Brock was a dangerous or violent man. (F.M.S. 321). The agents had no information as to whether there were persons other than Brock or contraband on the premises. (F.M.S. 322).

Agent Brown admitted at the second trial that government agents did not observe persons both entering and exiting Brock's house. (F.T.T. 60). This admission directly contradicted the government's testimony at the initial trial that agents spotted persons busily

entering and exiting Brock's house. (F.T.T. 286).

After first observing Brock's apartment, the agents knocked on the front door and "fell into" the kitchen when Mr. Brock opened the door. (F.T.T. 89; F.M.S. 337-338). The agents did not have an arrest or search warrant. Brock identified himself and the agents arrested him. (F.M.S. 316). In entering the apartment, the agents found some white powder, a cutting instrument and some currency. (F.M.S. 290-370). Subsequent to Brock's arrest, the agents searched the apartment and found other items including a scale and additional white powder. (F.M.S. 367-371).

The agents arrested Mr. Brock, secured the apartment and proceeded to

procure a search warrant. (F.M.S. 327, 374). The next day, Agent Brown returned to the apartment with a search warrant. (F.M.S. 41). At that time more suspected cocaine, weapons, currency and paraphernalia were found in various rooms and locations in the apartment. (F.T.T. 329).

REASONS FOR GRANTING THE WRIT

I. DID THE ELEVENTH CIRCUIT COURT OF APPEALS MISAPPLY THE LAW OF THE CASE DOCTRINE IN REFUSING TO REEXAMINE THE ISSUE OF EXIGENT CIRCUMSTANCES WHERE THE PANEL HAD RULED ON THAT ISSUE ON APPEAL FOLLOWING THE FIRST TRIAL AND ADHERED TO THAT RULE ON APPEAL FOLLOWING THE SECOND TRIAL DESPITE THE PRESENTATION OF SUBSTANTIALLY DIFFERENT FACTS?

This case raises the basic principles involved in the constitutionality of warrantless arrests in private dwellings.

The law of the case doctrine compels reconsideration of this action. That doctrine mandates reconsideration of issues previously examined by a court of appeals when a subsequent trial produces new evidence or evidence which substantially differs from the evidence

originally considered by the appellate panel. United States v. Robinson, 690 F.2d 69 (11th Cir. 1982); EEOC v. International Longshoremen's Association, 623 F.2d 1054 (5th Cir. 1980). In the case at bar, the Defendant Brock's retrial revealed three new crucial facts which conclusively demonstrate that exigent circumstances did not exist at the time government agents improperly entered and searched his home without a warrant.

First, in contrast with the testimony at the first trial, at the second trial, Agent Charlie Brown admitted that Brock did not know agents were coming to his home. (F.T.T. 60). Therefore, agents had no basis to fear imminent destruction of evidence and, as a result, their warrantless intrusion

into Brock's home could not be justified on that basis.

Second, contrary to his testimony at the first trial, Agent Brown admitted that Brock did not expect Bennett to call him later that evening or to appear at his home. (F.T.T. 59). As a result, Bennett's failure to call Brock or appear at his home the evening of the phone call could not have raised Brock's suspicion that something was amiss and cause him to flee or destroy evidence. Moreover, had Bennett's failure to contact Brock later that evening been a "tip off" to Brock, Agent Brown could provide no reason whatever for prohibiting Bennett, who was in government custody, from calling Brock to alleviate Brock's suspicion. Accordingly, even if Brock's suspicion

had been raised, the agents themselves created the situation. As such, the government is prohibited from justifying the warrantless intrusion into Brock's home by the situation it created.

Third, at the retrial the government agent admitted that he did not see persons both entering and exiting Brock's house. (F.T.T. 60). This directly contradicted the government's testimony at the initial trial. Therefore, the agents conducting the surveillance had no grounds to presume that Brock was busily transacting drug related business. (F.T.T. 286). As a result, this case differs substantially from the case of United States v. Gaultney, 581 F.2d 1137 (5th Cir. 1979), in which the Fifth Circuit found that a "beehive of activity" with people

constantly coming and going created an exigent circumstance.

The panel below erred in failing to reconsider the issue of exigent circumstances when presented with the foregoing additional facts from the second trial. A grant of certiorari is merited to review and revise the judgment below to ensure the correct application of the law of the case doctrine.

II. IS THE PANEL'S FINDING THAT EXIGENT CIRCUMSTANCES EXISTED TO JUSTIFY THE GOVERNMENT'S WARRANTLESS INTRUSION INTO THE DEFENDANT'S DWELLING IN CONTRAVENTION TO SETTLED CASE LAW OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL?

"[T]he exigent circumstances doctrine is applicable only within the narrow range of circumstances that present a real danger to the police or the public or a real danger that evidence or a suspect might be lost." United States v. Bulman, 667 F.2d 1374 (11th Cir. 1982). The government must have a reasonable basis for assuming the occupant of a house is armed and that lives are in danger. U.S. v. Thompson, 700 F.2d 944, 947 (5th Cir. 1983). A mere suspicion that a suspect owns a gun is not enough. United States v. Fluker, 543 F.2d 709, 717 (9th Cir. 1976). See

also Sabbath v. United States, 391 U.S. 585, 591 (1968).

There is no evidence indicating that agents feared that Mr. Brock was dangerous or could have endangered the police or the public. Indeed, Agent Brown admitted that he had no information that Brock even carried a gun. (F.T.T. 321).

Moreover the 'mere presence of drugs' on the premises, Thompson, at 947 (citing United States v. Kane, 637 F.2d 974, 980 (3d Cir. 1981), or the fact that a crime is occurring are not per se exigent circumstances which would justify a warrantless entry. United States v. Torres, 705 F.2d 1287 (11th Cir. 1983) (citing United States v. Blasco, 702 F.2d 1315, 1325 (11th Cir. 1983)).

Another justifiable exigent circumstances arises when the government demonstrates that agents had reason to believe that evidence was in danger of imminent destruction. United States v. Torres, 705 F.2d 1287, 1297 (11th Cir. 1983). See Vale v. Louisianna, 399 U.S. 30 (1969). The evidence must be in immediate peril. Torres at 1297. As the United States Supreme Court has declared, police seeking to act without a warrant must face a "now or never situation." Roaden v. Kentucky, 13 U.S. 496, 505 (1973).

Such a situation arises where an event occurs that would trigger a person's suspicion that agents were surveilling or monitoring. For example, in United States v. Rubin, 474 F.2d 264, 268 (3d Cir. 1972) [cited with approval

in United States v. Thompson, 700 F.2d 944, 948 (5th Cir. 1983), the court held that an exigent circumstance arose when a suspect, who was arrested near his confederate's home, uttered a yell which police could have assumed was a warning to his confederates that police were in the area and that they should "dispose of the contraband quickly." Thompson at 948.

In the instant case Brock received no such warning. Bennett was in police custody and under their strict supervision when he made his sole communication (the telephone call) to Brock. The government presented no evidence that Brock received any warning that police were in the area. In fact, Agent Brown testified that Brock did not know that the authorities were coming that night. (S.T.T. 60).

This may be contrasted with United States v. Turner, 650 F.2d 526 (4th Cir. 1981), and U.S. v. Delguyd, 542 F.2d 346 (6th Cir. 1976) where agents, in effecting the arrest of the Defendant, observed other persons - possibly the defendant's confederates - watching the arrest and reasonably believed the confederates would destroy the evidence at once. This fear of imminent destruction was sufficient to justify the warrantless arrest. In the instant case police arrested Bennett far from Brock's home and neither Brock nor his confederates witnessed the arrest. The most compelling evidence that agents did not fear imminent destruction of the contraband is Special Agent's Brown

devastating admission at the second trial:

> Q: Did you have any facts that you knew about that made you believe that Brock knew you were coming? Did Brock knew you were coming?
>
> A: No. (S.T.T. 60).

Bennett's failure to arrive at Brock's home the evening of the telephone call could not have been a signal to Brock that agents were monitoring him. At the second trial, Agent Brown admitted that Brock did not expect Bennett to visit Brock's home on the night of the telephone call. (S.T.T. 59).

This is easily distinguishable from United States v. Gaultney, 581 F.2d 1137 (5th Cir. 1979), in which the court found that an exigent circumstance arose where the defendant's confederate failed to return to the defendant's house

according to a precise, pre-arranged plan following a drug transaction. In the instant case, no such meeting had been arranged. Therefore, the fact that Bennett did not arrive at Brock's home could not, as in Gaultney, raise "flags" or arouse Brock's suspicion.

The government has failed to establish either (1) that lives were in danger or (2) that evidence was in danger

of imminent destruction, at the time of the warrantless intrusion into the Defendant's dwelling. The panel's determination that such exigent circumstances existed is clearly in conflict with applicable decisions of this Court and other circuits so as to warrant the granting of certiorari.[2]

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[2]In United States v. Congote, 656 F.2d 971 (5th Cir. 1981), which involved one of Brock's co-defendants, the court, examining the same search at issue, squarely held that there were no exigent circumstances to justify the warrantless entry. Though highly persuasive, the case was not dispositive of Brock's initial appeal since the court in Congote stated that this was not a definitive holding that rights had been violated. Congote at 975 n. 6. Because the defendant in Congote lacks standing to contest the illegal search, his conviction was affirmed.

III. ASSUMING ARGUENDO THAT THE INFORMANT'S FAILURE TO APPEAR AT THE DEFENDANT'S HOME THE EVENING OF THE ARREST CONSTITUTED AN EXIGENT CIRCUMSTANCE, DOES THE FACT THAT THE GOVERNMENT CREATED THAT EXIGENCY PRECLUDE THE GOVERNMENT FROM RELYING UPON IT TO JUSTIFY THE SEARCH?

It is well settled that government-created exigent circumstances cannot justify a warrantless search. United States v. Thompson, 700 F.2d 944 (5th Cir. 1983); United States v. Scheffer, 463 F.2d 567 (5th Cir. 1979). See also United States v. Hare, 589 F.2d 1291, 1294 (6th Cir. 1979); United States v. Rosselli, 506 F.2d 627, 630 (7th Cir. 1974); United States v. Curran, 498 F.2d 30, 34 (9th Cir. 1974).

Assuming arguendo that Bennett's failure to call Brock the evening of the arrest constituted an exigent circumstance, there can be no doubt that the government created the situation. If

the agents thought Brock expected Bennett to call or visit, they could have easily ameliorated the situation by having Bennett call Brock later to "cancel" the visit or by having Bennett meet with Brock. But they did neither.

In Scheffer, supra, the court rejected the government's argument that exigent circumstances arose where the government had actually planned the raid which lead to the warrantless arrest. Likewise, in Thompson the government argued that the possibility a suspect may have recognized the government agent constituted an exigent circumstance. The Court warned that agents could not justify their search on the basis of exigent circumstances "of their own making." Thompson at 950.

The panel's decision in allowing the government to rely on the exigent circumstances of its own creation is irreconcilable with the principles of Scheffer, as well as settled precedent in other circuits, and merits a grant of certiorari to review and revise the judgment below.

CONCLUSION

For the foregoing reasons, it is urged that the Court accept jurisdiction of this cause and grant the Petition for Writ of Certiorari.

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Writ for Certiorari was mailed this 3 day of ~~January~~ Feb, 1984, to United States Solicitor General, Washington, D.C., and to Stanley Marcus, U.S. Attorney, 155 South Miami Avenue, Miami, Florida 33130.

By: _____
THEODORE KLEIN

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Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 83-5071

(Non-Argument Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JACK BROCK,

Defendant-Appellant.

Appeal from the United States
District Court For the
Southern District of Florida

(November 15, 1983)

Before HATCHETT, ANDERSON, and CLARK, Circuit Judges.

PER CURIAM:

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1.	Opinion of the Eleventh Circuit Court of Appeals in U.S. v. Brock	1

Jack Brock was charged with various drug-related offenses.[1] He argued that evidence had been obtained illegally following a warrantless arrest, and the district court ordered the evidence suppressed. On appeal, this circuit reversed the district court, holding, inter alia, that Brock's arrest had been justified by "exigent circumstances." United States v. Marszalkoski, 669 F.2d 655 (11th Cir. 1982). The case was remanded for trial and Brock was found guilty on all counts.

On appeal, Brock alleges that the court below improperly denied his motion to suppress. Because the Marszalowski panel considered the issue

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[1]The offenses primarily involved the possession and distribution of cocaine. See 21 U.S.C. §§846, 841(a)(1), 843(b) and 18 U.S.C. §2.

and held that there were "exigent circumstances," the threshold question is whether the "law of the case" doctrine bars reconsideration. We conclude that it does.

The "law of the case" doctrine binds both the district court and the court of appeals to findings of fact and conclusions of law made by the appellate court in a prior appeal of this same case. United States v. Robinson, 690 F.2d 896 (11th Cir. 1982); Lincoln National Life Ins. Co. v. Roosth, 306 F.2d 110 (5th Cir. 1962).[2] It is not a limit upon the court's jurisdiction,

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[2]In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. Id. at 1209.

but a doctrine designed to promote finality by respecting an earlier appellate opinion. White v. Murtha, 377 F.2d 428, 431 (5th Cir. 1967).

The doctrine is not absolute, however, and it is well established that an issue may be reconsidered when "(1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to that issue, or (3) the prior decision was clearly erroneous and would work manifest injustice." United States v. Robinson, 690 F.2d at 872.

Brock alleges that facts developed during his second trial were so "substantially" different that this appeal warrants reconsideration. Having reviewed the record, we do not believe

that the three factual differences claimed by Brock are "substantial.[3] Taken in combination, they do not so undermine the court's rationale in United States v. Marszalowski, supra, that the need for a fresh analysis of "exigent circumstances"

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[3]Brock claims that federal agent Brown testified at the second trial that Brock had no idea that drug agents would be coming to his home. There is no indication that this testimony represents a difference from that presented in the first trial; the first panel did not mention impending presence of drug agents in its examination of "exigent circumstances." Brock also claims that Agent Brown "admitted" at the second trial that Brock had no expectation that informant Bennett would arrive at his house on the night of the arrest. The record gives no support for that characterization of Brown's testimony. Finally, Brock claims that Agent Brown changed his testimony from the first trial, testifying that he saw two figures "leaving Brock's house rather than "entering and leaving" it. This change is inconsequential.

is indicated. That holding must therefore stand.

AFFIRMED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Appendix to Petition for Writ of Certiorari was mailed this ____ day of February, 1984 to United States Solicitor General, Washington, D.C. and to STANLEY MARCUS, U.S. Attorney, 155 So. Miami Avenue, Miami, Florida 33130.

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